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No. 91-1230

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HOUSTON LIGHTING AND POWER COMPANY,
Petitioner,

v.

THE HONORABLE JOSEPH B. MORRIS, JUDGE
(CITY OF SAN ANTONIO AND CENTRAL POWER
AND LIGHT COMPANY, REAL PARTIES IN INTEREST),
Respondents.

PETITIONER'S REPLY BRIEF

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March 20, 1992

LIST OF PARTIES

HOUSTON LIGHTING & POWER COMPANY

Petitioner,

CITY OF SAN ANTONIO, TEXAS,
ACTING BY AND THROUGH
CITY PUBLIC SERVICE BOARD OF SAN ANTONIO,

CENTRAL POWER AND LIGHT COMPANY,

CITY OF AUSTIN, TEXAS[1]

HONORABLE JOSEPH B. MORRIS,
Judge of the 101st Judicial District Court of
Dallas County, Texas[2]

Respondents.

RULE 29.1 STATEMENT

Houston Lighting & Power Company ("HL&P") is a wholly owned subsidiary of Houston Industries, Inc., which is a publicly held company. Central Power and Light Company ("CPL") is a wholly owned subsidiary of Central and Southwest Corporation, which is a publicly held company.

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[1] The City of Austin was not a party to the state district court proceedings but, at Austin's request, was named as a party in interest when HL&P sought review by mandamus in the Texas appellate courts.

[2] As presiding judge of the 101st Judicial District Court of Dallas County, Judge Morris made the rulings which are the subject of this Petition. Under Texas mandamus procedure, he was named as a formal respondent in the ensuing mandamus proceedings in the Texas appellate courts, but has no interest in the subject matter.

TABLE OF CONTENTS

	Page
LIST OF PARTIES	i
I. This Court Has Jurisdiction	1
II. Appeal of an Award Is Not an Adequate Remedy for a Structurally Biased Panel	2
III. Unless the Structural Bias of the Panel Is Corrected Before Arbitration, HL&P's Claims Will Evade Review	5
IV. Neutrality Oaths Are Insufficient to Guarantee Due Process	6
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

Baltimore Contractors, Inc. v. The United States, 643 F.2d 729 (Ct. Cl. 1981) 4

Commonwealth Coatings v. Continental Casualty Co., 393 U.S. 145 (1968) 2, 3, 7, 8

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 2

Crane v. Tunks, 328 S.W.2d 434 (Tex. 1959) 2

Dennis v. United States, 339 U.S. 162 (1950) 7

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980) ... 5

Dunn v. Blumstein, 405 U.S. 330 (1972) 5

Employers Insurance of Wausau v. National Union Fire Ins. Co. of Pittsburgh, 933 F.2d 1481 (9th Cir. 1991) 4

General Motors Corp. v. Lawrence, 651 S.W.2d 732 (Tex. 1983) 2

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) 3

Honig v. Doe, 484 U.S. 305 (1988) (Rehnquist, C.J., concurring) 6

Irvin v. Dowd, 366 U.S. 717 (1961) 7

Lozano v. Maryland Casualty Co., 850 F.2d 1470 (11th Cir. 1988), *cert. denied*, 489 U.S. 1018 (1988) 4

Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983) 4

Ormsbee Development Co. v. Grace, 668 F.2d 1140 (10th Cir. 1982), *cert. denied*, 459 U.S. 838 (1982) 3

Pitta v. Hotel Association of New York City, Inc., 806 F.2d 419 (2nd Cir. 1986) 4

Roe v. Wade, 410 U.S. 113 (1973) 5

Sosna v. Iowa, 419 U.S. 393 (1975) 5

Southern Pacific Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498 (1911) 5

State v. Thomas, 766 S.W.2d 217 (Tex. 1989) 2

State v. Walker, 679 S.W.2d 484 (Tex. 1984) 2

Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) 5

Tumey v. Ohio, 273 U.S. 510 (1926) 5

United States v. Burr, 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14,692g) 6

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 5

Page

STATUTES

Federal Arbitration Act, 9 U.S.C. §1 et. seq. 3

28 U.S.C. §1257(a) 2

Texas Arbitration Act, Tex. Rev. Civ. Stat. Ann.
Art. 224, et. seq 3, 4, 6

Art. 235(G) 2

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PETITIONER'S REPLY BRIEF

I. This Court Has Jurisdiction

The principal theme of the Briefs in Opposition is Respondent's claim that because issues of arbitrability can be reviewed on appeal from the arbitrators' award, the Texas appellate courts wisely refused to interfere with the trial court's order, and this Court should do the same. This argument, however, does not reach HL&P's complaint that it is being subjected to arbitration before a structurally biased panel — controlled four-to-one by arbitrators chosen by HL&P's opponents — which fails to meet minimal constitutional requirements of impartiality. Review after an award by a biased panel is not adequate because embedded bias may produce an award unassailable under the statutory standards of review.

The structural flaws in the proposed five-member panel of arbitrators, at least three of whom are appointed by the claimants against HL&P, raise questions of due process, not mere matters

of contract interpretation. This court has jurisdiction under 28 U.S.C. §1257(a) to review the failure of the Texas courts to vindicate HL&P's constitutional right to arbitration before an impartial panel.

HL&P's request that the arbitration panel be restructured *before* arbitration to ensure fairness invoked the unquestioned equitable powers of the trial court to do so, as well as plenary authority granted to it under the Texas General Arbitration Act (the "Texas Act"), article 235(G). When the trial court refused to act, HL&P exhausted any available remedy by mandamus in the Texas appellate courts.[3] Although further state proceedings will occur on judicial review of any arbitration award, the highest court of the State of Texas has finally determined against HL&P the particular constitutional issue here. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480-81 (1975), holding that the "final-judgment rule" includes cases where "further proceedings on the merits in the state courts [are] to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." HL&P's contentions can be properly addressed only now, *before* the arbitration occurs. After arbitration, bias may be buried in an award subjected to only limited review.

II. Appeal of an Award Is Not an Adequate Remedy for a Structurally Biased Panel

HL&P asserts a right not to be forced to undergo arbitration before a panel that lacks the "elementary requirements of impartiality," *Commonwealth Coatings v. Continental Casualty Co.*,

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[3] Mandamus is available under Texas law to correct fundamental errors at the outset when later appeal is insufficient to protect a litigant's rights. *State v. Thomas*, 766 S.W.2d 217 (Tex. 1989); *State v. Walker*, 679 S.W.2d 484 (Tex. 1984); *General Motors Corp. v. Lawrence*, 651 S.W.2d 732 (Tex. 1983); *Crane v. Tunks*, 328 S.W.2d 434 (Tex. 1959).

393 U.S. 145, 149 (1968). After the arbitral award is made, HL&P's constitutional assertion that it cannot be required to submit to arbitration before a biased panel will be moot. It will then be relegated to an appeal from the arbitration award as the forum to assert its claim that "private dispute settlement arrangements" must "operate within some minimum levels of integrity" before they may be enforced through the courts. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976).

However appeal is not an effective remedy when the panel is weighted against HL&P by a majority of arbitrators appointed by the claimants against it. The limited grounds for appeal under the Federal or the Texas Arbitration Acts require a showing of "evident partiality," "corruption," prejudicial misconduct or "willful misbehavior." Each of these grounds focuses on the conduct of *individual* arbitrators and fails to address the fact that bias may result from the way that a panel is composed. Although party-appointees are not held *individually* to the same standards that neutral arbitrators are (see HL&P's Petition at 12–13), if the majority of panel members are appointed by the claimants against HL&P, the arbitration panel itself lacks the requisite impartiality. In such a proceeding, bias may take the surreptitious form of a massive damage award against HL&P as the natural product of an arbitration dominated by HL&P's adversaries, acting through their appointees.

Although the constitutional standards established in *Commonwealth Coatings* are recognized, there is no consensus as to the degree of proof required to show bias on appeal of an arbitral award. On one hand, the Tenth Circuit has held that "it is only clear evidence of impropriety which justifies the denial of summary confirmation of an arbitration award." *Ormsbee Development Co. v. Grace*, 668 F.2d 1140 (10th Cir. 1982), *cert. denied*, 459 U.S. 838 (1982). On the other, the Seventh Circuit has held that the "appearance of bias" standard "just means that it is

unnecessary to demonstrate — what is almost impossible to demonstrate — that the arbitrator had an actual bias." *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983). Between these two extremes the Second Circuit has held that the "mere appearance of bias that might disqualify a judge will not disqualify an arbitrator," but stated in the same case:

> the relationship between a party and the arbitrator may, in some circumstances, create a risk of unfairness so inconsistent with basic principles of justice that the arbitration award must automatically be vacated.

Pitta v. Hotel Association of New York City, Inc., 806 F.2d 419, 423-24 (2nd Cir. 1986). Taking still a different approach, the U.S. Court of Claims has held that

> Since it is impermissible for the court to probe the decisional and thought processes of the [arbitral] Board and its members . . . care must be taken to avoid any situations that possess a significant danger of improper influence. Indeed, even where there is not claim of actual bias, a tribunal may be disqualified merely because of the appearance of bias.

Baltimore Contractors, Inc. v. The United States, 643 F.2d 729 (Ct. Cl. 1981) (citations omitted). The Ninth Circuit requires "more than a mere appearance of bias to disqualify an arbitrator," *Employers Insurance of Wausau v. National Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481 (9th Cir. 1991); the Eleventh Circuit requires only that the "possibility of bias be direct, definite, and capable of demonstration." *Lozano v. Maryland Casualty Co.*, 850 F.2d 1470 (11th Cir. 1988), *cert. denied*, 489 U.S. 1018 (1988). Because HL&P's burden of proof on appeal is unsettled and ill-defined, review by a court on an appeal from the arbitrators' award cannot guarantee its right to due process.

The Texas Act presents a similar problem, as it offers HL&P no means to appeal an award from a panel that is *structurally* biased but displays no overt partiality. HL&P cannot, for exam-

ple, seek reversal of a decision by the arbitrators that goes against the great weight and preponderance of the evidence, nor can it obtain trial *de novo*. The mere possibility of review or the prospect that bias may be later corrected on appeal does not make an unfair proceeding constitutionally acceptable. *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972); *Tumey v. Ohio*, 273 U.S. 510, 533 (1926). Due process requires "a neutral and detached judge in the first instance." *Ward* at 62.

III. Unless the Structural Bias of the Panel Is Corrected Before Arbitration, HL&P's Claims Will Evade Review

Unless the structural bias of the panel is corrected before arbitration, HL&P will have no effective forum for assertion of its claim. Like complaints of short-lived orders, HL&P's assertions of a right to due process would evade review and, in a real sense, become moot. In *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911), the Court created an exception to the mootness principle for controversies "capable of repetition, yet evading review," based on the Court's recognition that rote application of its prudential rules would sometimes leave claimants "without a chance of redress."

HL&P faces a similar procedural anomaly in an important area of national policy. The efforts of Congress and the courts to promote fair arbitration as an alternative to litigation are no less important than issues of residency requirements for divorce or for voting, *Sosna v. Iowa*, 419 U.S. 393 (1975), *Dunn v. Blumstein*, 405 U.S. 330 (1972); credit card usury, *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980); welfare benefits for striking workers, *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); or the right of a woman to terminate her pregnancy, *Roe v. Wade*, 410 U.S. 113 (1973). The significance of the issues presented in each of these cases led the Court to avoid the mootness of particular controversies by providing appropriate relief when review after the fact would have been ineffective.

The "capable of repetition, yet evading review" exception also acknowledges "the unique and valuable ability of this Court to decide a case — we are, at present, the only Art. III court which can decide a federal question in such a way as to bind all other courts." *Honig v. Doe*, 484 U.S. 305, 332 (1988) (Rehnquist, C.J., concurring). Given the current prominence of alternative dispute resolution and the proliferation of multi-party contracts, it is particularly important that this Court reaffirm the principle that the due process standards applicable to judicial proceedings are not suspended when arbitration is used as a substitute for litigation. When literal application of an arbitration clause results in an unconstitutional hearing process, the purpose of arbitration is lost; the forest disappears behind the trees. HL&P asks this Court to set aside the orders of the Texas courts which deny it an impartial tribunal to arbitrate the claims against it.

IV. Neutrality Oaths Are Insufficient to Guarantee Due Process

San Antonio concedes that an impartial panel is essential to due process, but declares flatly that this panel — composed of a majority of arbitrators appointed by claimants against HL&P — *is* fair. But numerous courts have acknowledged that neutrality cannot be created by declaration (see authorities cited in HL&P's Petition at 14-15), a fact also reflected in the rules of the American Arbitration Association and the Texas Act (see Appendix G and Appendix J to HL&P's Petition).

The common law has long recognized that the taking of an oath does not guarantee impartiality, otherwise there would be no basis to review challenges to jurors for cause. Chief Justice John Marshall wrote at length about this healthy skepticism in *United States v. Burr*, 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14,692g):

> The great value of the trial by jury certainly consists in its fairness and impartiality . . . . [T]o secure this end, a man is prohibited from serving on it whose *connection with a party is*

> *such as to induce a suspicion of partiality*. The relationship may be remote; the person may never have seen the party; *he may declare that he feels no prejudice in the case*; and *yet the law cautiously incapacitates him* from serving on the jury because it suspects prejudice, *because in general persons in a similar situation would feel prejudice* . . . . Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason.

Id. at 50 (emphasis added).

Thus although a prospective decision maker may be "sincere when he said that he would be fair and impartial to petitioner . . . the psychological impact requiring such a declaration before one's fellows is often its father." *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). There are sound reasons for the categorical limitation of party-appointees to a minority on an arbitration panel:

> [I]n the run of instances that are likely to generate bias, consciously or unconsciously, it would be a hopeless endeavor to search out the impact of these circumstances on the mind and judgment of a particular individual. Law as a response to life recognizes the operation of such influences even though not consciously or clearly entertained. *The appearance of impartiality is an essential manifestation of its reality*.

Dennis v. United States, 339 U.S. 162, 181-2 (1950) (Frankfurter, J., dissenting) (emphasis added). *Commonwealth Coatings* reached the same conclusion, reasoning that even though an arbitrator was not "actually guilty of fraud or bias in deciding [a] case," and even though there was no reason "to suspect him of improper motives," the Court

> should, if anything be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free reign to decide the law as well as the facts and are not subject to appellate review.

Id. at 149.

CONCLUSION

The Court has jurisdiction in this case. HL&P is seeking review of actions of the Texas courts which require it to submit to arbitration before a partial and imbalanced forum in violation of its right to due process. If the arbitration proceeds before the panel as it is currently structured, HL&P's right cannot later be effectively asserted on appeal from an award. The distinction between truly neutral arbitrators and party appointees is well established and, under the standards articulated in *Commonwealth Coatings*, should lead the Court to grant HL&P's Petition and reaffirm the application of due process principles to arbitration.

Respectfully submitted,

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